Supreme Court, U. S.
FILED
JAN 30 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1065

ANNA ERNA LAWRIW,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MARC G. KURZMAN
MARC G. KURZMAN LAW OFFICE, CHARTERED
601 West Butler Square
Minneapolis, Minnesota 55403
(612) 333-4403

Assisted By:
RONALD S. GOLDSER, Law Clerk
MARC G. KURZMAN LAW OFFICE, CHARTERED
601 West Butler Square
Minneapolis, Minnesota 55403

1978—Northwest Brief Printing Co., 316 Chicago Avenue, Minneapolis 55415—338-5078

TABLE OF CONTENTS

	Page
Petition for Writ of Certiorari	1
Citations to Opinions Below	2
Jurisdiction	2
The Questions Presented	2
Constitutional Provisions and Rules Involved	3
Statement of the Case	4
Reasons for Granting the Writ:	
1. The Eighth Circuit Court of Appeals has decided a federal question regarding waiver of effective assistance of counsel in conflict with applicable decisions of the United States Supreme Court	7
2. By its decision, the Eighth Circuit sanctioned a departure by the District Court from the accepted and usual course of judicial proceedings so as to call for an exercise of the Supreme Court's power of supervision	13
3. The conflict among Circuits on the issue in this case is manifest from the opinion of the Eighth Circuit and the Supreme Court should grant certiorari to resolve this conflict	16
4. The United States Supreme Court should grant certiorari to decide an important federal question that has not been but should be decided	22
Conclusion	30

APPENDIX INDEX

Appendix A—Opinion of United States Court of Appeals for the Eighth Circuit A-1
Appendix B—Findings of Fact, Conclusions of Law, and Order, United States District Court, District of Minnesota A-18

TABLE OF AUTHORITIES

Cases:

Adams v. U.S. ex rel. McCann, 317 U.S. 269 (1942) . 11
Barker v. Wingo, 407 U.S. 514 (1973) 11
Boykin v. Alabama, 395 U.S. 238 (1969) 11, 12
Brookhart v. Janis, 384 U.S. 1 (1966) 11
Campbell v. U.S., 352 F. 2d 359 (D.C. Cir. 1965) 16, 17, 19
Carnley v. Cochran, 369 U.S. 506 (1962) 12, 13
Chapman v. California, 386 U.S. 18 (1967) 21
Faretta v. California, 422 U.S. 806 (1975) .8, 11, 28, 29
Fryar v. U.S., 404 F. 2d 1071 (10th Cir. 1968), cert. den. 395 U.S. 964 (1969) 28
Glasser v. U.S., 315 U.S. 60 (1942) 8, 10
Green v. U.S., 355 U.S. 184 (1957) 11
Johnson v. Zerbst, 304 U.S. 458 (1937) 8, 11
Larry Buffalo Chief v. South Dakota, 425 F. 2d 271 (8th Cir. 1970) 7
Lollar v. U.S., 376 F. 2d 243 (D.C. Cir. 1967) 21
Manson v. Pitchess, 317 F. Supp. 816 (C.D. Calif. 1970) 28
Matter of Grand Jury Empaneled January 21, 1975, 536 F. 2d 1009 (3d Cir. 1976) 26
McCarthy v. U.S., 394 U.S. 459 (1968) 9, 10
Saltonstall v. Russell, 152 U.S. 628 (1893) 10
Schneckloth v. Bustamonte, 412 U.S. 218 (1974) ... 11
Seale v. Hoffman, 306 F. Supp. 330 (N.D. Ill. 1969) . 28
State v. Olsen, — Minn. —, 258 NW2d 898 (1977) 7, 16, 18, 21
U.S. v. Bernstein, 533 F. 2d 775 (2d Cir. 1976) 24
U.S. v. Carrigan, 543 F. 2d 1053 (2d Cir. 1976) ... .17, 18, 19, 24, 25
U.S. v. Davis, 452 F. 2d 577 (10th Cir. 1971) 11
U.S. v. Davis, 260 F. Supp. 1009 (E.D. Tenn. 1966) 28
U.S. v. Donahue, 560 F. 2d 1039 (1st Cir. 1977) 17, 19, 21
U.S. ex rel. Hart v. Davenport, 478 F. 2d 203 (3d Cir. 1973) 17, 19, 21, 25
U.S. Foster, 469 F. 2d 1 (1st Cir. 1972) 21
U.S. v. Garafola, 428 Supp. 620 (D.N.J. 1977) 22, 28, 29
U.S. v. Garcia, 517 F. 2d 272 (5th Cir. 1975) 9, 13, 16, 18, 20, 28
U.S. v. Kutas, 542 F. 2d 527 (9th Cir. 1976) 17, 20, 21
U.S. v. Lariche, 549 F. 2d 1088 (6th Cir. 1977) ..17, 19
U.S. v. Mandell, 525 F. 2d 671 (7th Cir. 1975) ..17, 20
U.S. v. Mari, 526 F. 2d 117 (2d Cir. 1975) 23
U.S. v. Smith, 550 F. 2d 277 (5th Cir. 1977) 17
U.S. v. Swanson, 509 F. 2d 1205 (8th Cir. 1975) ... 7
U.S. v. Truglio, 493 F. 2d 574 (4th Cir. 1974) ..17, 18
U.S. v. Warledo, 557 F. 2d 721 (10th Cir. 1977) ..17, 20
Von Moltke v. Gillies, 332 U.S. 708 (1948) 9, 10, 11, 13, 22

Statutes:

Federal Rules of Criminal Procedure, Rule 11 ..3, 9, 18
18 U.S.C. §3231 2
21 U.S.C. §841(a)(1) 4
28 U.S.C. §1254 2
28 U.S.C. §1291 2
United States Constitution, Amendment VI 3

Secondary Authorities:

A. Cole, "Time for a Change: Multiple Representation Should Be Stopped," (unpublished) 27
S. Hyman, "Joint Representation of Multiple Defendants in a Criminal Trial," 5 Hofstra Law Review 315 (1977) 10, 22

IN THE

Supreme Court of the United States

October Term, 1977

No. ———

ANNA ERNA LAWRIW,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioner, Anna Erna Lawriw, prays the United States Supreme Court to issue a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Eighth Circuit, rendered in these proceedings on December 30, 1977, affirming the Order of the United States District Court for the District of Minnesota, entered on May 12, 1977.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit affirming the District Court is not yet reported and is reprinted herein as Appendix A. The Or-

der of the United States District Court for the District of Minnesota, denying Petitioner's motion for a new trial, was entered from the bench, and is not reported. That portion of the transcript of Petitioner's motion for new trial, dealing with the District Court's findings and conclusions, is reprinted herein as Appendix B.

JURISDICTION

Jurisdiction of the United States District Court was invoked by indictment, pursuant to 18 USC §3231. Jurisdiction on appeal to the Eighth Circuit was obtained via 28 USC §1291. Jurisdiction on writ of certiorari exists under 28 USC §1254.

The District Court heard and denied Petitioner's motion for a new trial on May 12, 1977. The Eighth Circuit affirmed on December 30, 1977.

THE QUESTIONS PRESENTED

1. Whether the District Court's affirmative inquiry into, and personal advice to each of multiple co-defendants represented by one attorney about, conflict of interest and effective assistance of counsel is sufficient to ensure a Constitutionally adequate, voluntary and intelligent waiver thereof?

2. Whether the burden of proof to show that one of multiple codefendants represented by one attorney is not prejudiced by a conflict of interest shifts to the government when a Constitutionally insufficient record exists as to the appearance and waiver of conflict of interest?

3. Whether the District Court must automatically require multiple co-defendants to secure individual counsel

because the Trial Judge and one attorney representing multiple co-defendants are Constitutionally unable to inform those multiple co-defendants about conflict of interest sufficiently to secure a knowing, voluntary and intelligent waiver thereof?

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

This case involves the Sixth Amendment Provisions concerning the right to counsel:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

The case also involves Rule 11(c) and (d), Federal Rules of Criminal Procedure, which provide:

> (c) Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:
>
> (1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and
>
> (2) if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him and, if necessary, one will be appointed to represent him; and
>
> (3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and that he has the right to be tried by

a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and

(4) that if he pleads guilty or nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial; and

(5) that if he pleads guilty or nolo contendere, the court may ask him questions about the offense to which he has pleaded, and if he answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or false statement.

(d) Insuring That the Plea is Voluntary. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or his attorney.

STATEMENT OF THE CASE

Petitioner Anna Lawriw was convicted in a joint trial with Terrence Richard Noto of possession of cocaine with intent to distribute in violation of 21 U.S.C. §841(a)(1). The case was tried to the District Court on stipulated facts. Following conviction, Petitioner filed a motion for new trial on the grounds of newly discovered evidence, asserting that at her joint trial she received Constitutionally defective assistance of counsel resulting from a conflict of interest faced by her attorney; one attorney represented both defendants. Her motion was denied by the District Court, the Honorable Miles W. Lord, J., which held that there was no conflict of interest, and that even if there was, it was waived. (See Appendix B) This decision was affirmed by the Court of Appeals for the Eighth Circuit, the Honorable William H. Webster, J. (See Appendix A) The Eighth Circuit held that the District Court met its duty of affirmative inquiry into the existence of conflict of interest and waiver, and set forth the requirements which the District Court must meet in securing a Constitutionally sufficient determination of conflict and waiver. Petitioner contends in this Petition that the Eighth Circuit erred in the limited requirements set forth in its procedure promulgated to elicit a voluntary and intelligent waiver of effective assistance of counsel, and in failing automatically to require appointment or retaining of separate counsel for jointly charged defendants.

Petitioner Lawriw and Co-Defendant Noto were represented from the time of arrest through their joint trial on stipulated facts by one attorney. Their arrest took place under circumstances which easily call forth possibilities of individual defenses on the merits. Federal agents entered the Minneapolis motel room where the co-defendants were staying and seized approximately one pound of cocaine found in a flight bag. This flight bag contained male and female toiletries and a prescription vial in the name of Petitioner. At the time the agents entered, Petitioner was seated on a bed, adjacent to a suitcase containing $5,700 in cash. Petitioner asserted at her motion for

new trial that she did not know at the time of her arrest that there was approximately one pound of cocaine in the room. She asserted that she knew only of the existence of less than one ounce of cocaine in the room. She therefore asserted the rudiments of a defense whereby she denied constructive possession of one pound of cocaine, an element necessary for a finding of guilty of possession with intent to distribute.

Petitioner and Co-Defendant Noto were at all times through to the completion of their joint trial represented by Joseph Friedberg, Esq., of Minneapolis. It is asserted that these three individuals thoroughly discussed the possibilities of a conflict of interest, individual defenses, and the requirement of another attorney. The assertion, however, is made by Mr. Friedberg, and not the defendants. The District Court did listen to a brief discussion on the record at the joint trial concerning the existence of a conflict of interest and its waiver; the discussion was conducted by Mr. Friedberg, and was held primarily with Co-Defendant Noto. (Transcript of Trial, hereafter Tr., 20-23) The Court asked of Petitioner Lawriw one question: "Well, Miss Lawriw, have you been told that maybe another lawyer could, on looking at this, make a contention to a jury or to the Court that you have just been entrapped into this by Mr. Noto and that your interests and his are not the same, that you have maybe some chance where you could show it was all his fault or neither of yours fault?" Petitioner Lawriw responded: "I have been told by people that, yes, this could be done, and I am not interested in doing that." (Tr. 22) Based on this brief interchange, the District Court found no conflict of interest, and that if there was a conflict, it was waived. Evidence

presented at Petitioner's hearing on motion for new trial, May 12, 1977, failed to convince the Court otherwise. The Eighth Circuit agreed, and set forth standards to govern cases such as this.

REASONS FOR GRANTING THE WRIT

1. The Eighth Circuit Court of Appeals has decided a federal question regarding waiver of effective assistance of counsel in conflict with applicable decisions of the United States Supreme Court.

The Eighth Circuit is in conformity with decisions holding that waiver of conflict of interest must be knowing and intelligent. *U.S. v. Lawriw,* slip op. at 13; *United States v. Swanson,* 509 F. 2d 1205, 1210 n. 7 (8th Cir. 1975); *Larry Buffalo Chief. v. South Dakota,* 425 F. 2d 271, 280 (8th Cir. 1970). In order to ensure that this knowing and intelligent waiver be sufficiently presented on the record, the Eighth Circuit cites with approval the following procedure and suggests that the same be undertaken by the District Court:

> The defendant must voluntarily and with full knowledge of the consequences decide on dual representation. The court should address each defendant personally and advise him of the potential danger of dual representation. The defendant should have an opportunity and be at liberty to question the trial court on the nature and consequences of dual representation and the entire procedure should be placed on the record for review. . . . *State v. Olsen,* — Minn. —, 258 NW2d, 898, 907 (1977) (Footnotes omitted).

U.S. v. Lawriw, slip op. at 15.

We contend that this scope of inquiry required by the Eighth Circuit is not sufficient according to applicable de-

cisions of the Supreme Court. On this basis we contend a conflict exists between the Eighth Circuit Court and the Supreme Court and certiorari should be granted to resolve the conflict.

It is clear that a criminal defendant can waive effective assistance of counsel. *Johnson v. Zerbst*, 304 U.S. 458 (1937). To this end, a criminal defendant has the Constitutional right to proceed *pro se*. *Faretta v. California*, 422 U.S. 806 (1975). In all circumstances related to waiver of counsel, however, that waiver must be knowingly and intelligently made. *Faretta v. California, supra*. These circumstances expressly include waiving a conflict of interest which could result in ineffective assistance of counsel. *Glasser v. U.S.*, 315 U.S. 60 (1942).

It is unquestioned that the defendant's waiver of counsel must appear on the record and be available for review. *Faretta v. California, supra*, 422 U.S. at 835. At issue in this case is precisely what must appear on the record. The Supreme Court has said, in the context of a defendant's desire to appear *pro se* and plead guilty:

> . . . to discharge (the duty of determining whether there is an intelligent and competent waiver of counsel by the accused), . . . a judge must investigate as long and as thoroughly as the circumstances of the case before him demand. The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid, such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof and

> all other facts essential to a broad understanding of the whole matter. A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is entered.

Von Moltke v. Gillies, 332 U.S. 708, 723-724 (1948).

Thus, the Court in *Von Moltke*, 332 U.S. at 723, declared the *Constitution's* requirements of a long and probing inquiry prior to the acceptance of a guilty plea where defendant is without counsel. Under these circumstances, only if the district judge is satisfied that all procedural requirements of a guilty plea are met can he accept a waiver of counsel.

Presently, the procedure a district court must follow in accepting a guilty plea is outlined in Rule 11, Federal Rules of Criminal Procedure. While specific Rule 11 procedures have "not been held to be Constitutionally mandated," *McCarthy v. U.S.*, 394 U.S. 459, 465 (1968), *Von Moltke* indicated that the rudiments of a Rule 11 procedure are Constitutionally required in accepting a guilty plea. Thus, in order, knowingly and intelligently, to waive counsel (whether or not in the context of a guilty plea[1]) the Constitution requires that a rudimentary Rule 11 procedure be placed on the record. At least one Circuit Court of Appeals has recognized this principle. In *U.S. v. Gar-*

[1]"The cases draw no distinction between waiver of the right to remain silent during interrogation, the right to confer with counsel, the right to representation by competent counsel at trial, the right to contest accusations of criminality through a plea of not guilty, the right to a jury trial and the right to be present at trial. To do so would be to discriminate against one right in favor of another when the Constitution does not so require." *U.S. v. Garcia*, 517 F. 2d 272, 276 (1975).

cia, 517 F. 2d 272 (1975), the Fifth Circuit, citing *Von Moltke* and *McCarthy,* expressly adopted "a procedure akin to that promulgated in Federal Rules of Criminal Procedure, Rule 11," 517 F. 2d at 278, before allowing a District Court to accept a waiver of conflict of interest. Like the Fifth Circuit, Petitioner contends that decisions of the Supreme Court compel this procedure. The Eighth Circuit explicitly rejected this procedure. *U.S. v. Lawriw,* slip op. at 14-15.

We contend that *Von Moltke* alone decides this issue. Alternatively, *Von Moltke* is one of numerous decisions which, by analogy, decide the issue. *Von Moltke* dealt with a defendant appearing without counsel and pleading guilty. The instant case concerns a defendant appearing with an attorney whose loyalties are divided between her and her co-defendant. Under these circumstances, defendant received assistance of counsel that was trammeled and impaired. *Glasser v. U.S.,* supra, 315 U.S. at 70. "With respect to the Defendant's right to a fair trial, impaired counsel is equivalent to no counsel." S. Hyman, "Joint Representation of Multiple Defendants in a Criminal Trial, 5 *Hofstra Law Review,* 315, 317 (1977). Thus, Petitioner Lawriw essentially appeared at her joint trial on stipulated facts without counsel.

To complete the analogy, Petitioner Lawriw's "joint trial on stipulated facts" is enough like a guilty plea to require the court to inquire into the sufficiency and accuracy of the stipulation. *U.S. v. Lawriw,* slip op. at 17 n. 13. Given a stipulation of facts, a court need not make findings of fact, but must only render judgment on the law. *Saltonstall v. Russell,* 152 U.S. 628 (1893). Similarly, with a guilty plea, "the effect is the same as if appellant had been tried before a jury and had been found guilty on evidence covering all material facts." *U.S. v. Davis,* 452 F. 2d 577, 578 (10th Cir. 1971). Both situations require the advice of counsel before entering the stipulation or the plea. A court cannot permit a plea without inquiry, *Von Moltke v. Gillies, supra;* nor can it allow entry of a stipulation by a *pro se* defendant, without inquiring as to the defendant's waiver of counsel. *See Faretta v. California, supra.* Petitioner concludes, therefore, that *Von Moltke* alone controls the instant case.

Even if *Von Moltke* alone does not directly control the instant case, it is one of numerous cases which establish the proposition that the District Court must searchingly inquire into waiver of Constitutional rights before that waiver is accepted. The cases are collected in *Schneckloth v. Bustamonte,* 412 U.S. 218, 237-238. Each case cited in *Schneckloth* relies, as does *Von Moltke,* on *Johnson v. Zerbst, supra.* Since *Von Moltke* declares *Johnson's* requirement of a searching inquiry into waiver of counsel, it follows that knowing and intelligent waiver of other rights cannot be effective without a searching inquiry by the district court. Thus in *Adams v. U.S. ex rel. McCann,* 317 U.S. 269 (1942), the defendant waived his right to jury trial "with the considered approval of the court." 317 U.S. at 275. *Johnson* was also applied to the right to confrontation, *Brookhart v. Janis,* 384 U.S. 1, to a speedy trial, *Barker v. Wingo,* 407 U.S. 514, and to freedom from double jeopardy, *Green v. U.S.,* 355 U.S. 184. In the guilty plea context alone, waivers of jury trial, confrontation, and self-incrimination must appear on the record. *Boykin v. Alabama,* 395 U.S. 238 (1968). Finally,

Boykin relies on *Carnley v. Cochran,* 369 U.S. 506, wherein the Court held:

> Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver.

Carnley v. Cochran, 369 U.S. at 516.

The Supreme Court, therefore, requires the following procedure in waiving a conflict of interest:

1. The District Court shall address each defendant personally in open court;

2. The District Court shall advise each defendant of the right to a separate attorney and that, if necessary, one will be appointed;

3. The District Court shall also advise each defendant:

   a. Of the nature of the charges and the range of allowable punishments for those charges and for all lesser included offenses;

   b. Of the possible defenses to each charge and that an individual attorney could raise these defenses;

   c. Of all other facts essential to a broad understanding of the whole matter;

4. "Most significantly, *the court should seek to elicit a narrative response* from defendant that he has been advised of his right to effective representation,

that he understands the details of his attorney's possible conflict of interest and the potentials of such a conflict, that he has discussed the matter with his attorney or if he wishes with outside counsel and that he voluntarily waives his 6th Amendment protections." *U.S. v. Garcia, supra,* 517 F. 2d at 278.

Von Moltke v. Gillies, supra, Carnley v. Cochran, supra. The Eighth Circuit requires only items (1) and (3)(b) above, and places the burden of seeking information concerning her rights on the defendant by requiring only that the defendant "be at liberty to question the trial court on the nature and consequences of dual representation." *U.S. v. Lawriw,* slip op. at 15. By failing to set forth the requirements described in various Supreme Court decisions, the Eighth Circuit has promulgated a procedure in conflict with applicable Supreme Court decisions. Certiorari should be granted to resolve this conflict.

2. By its decision, the Eighth Circuit sanctioned a departure by the District Court from the accepted and usual course of judicial proceedings so as to call for an exercise of the Supreme Court's power of supervision.

Assuming that the law regarding the procedure in accepting a waiver of conflict of interest is as described above in argument 1, the Supreme Court must find that the Eighth Circuit sanctioned by its decision a drastic departure from required procedure. As noted above, the District Court is required to address each Defendant personally, inform each defendant of the nature of the charges and range of sentences resulting from those charges, de-

scribe to each defendant his right to separate retained or appointed counsel, delve into the possibility of the prejudice resulting from a conflict of interest and elicit a narrative response from each defendant as to the defendant's understanding of his rights and his voluntary waiver thereof. In the instant case, the entire trial transcript covers 42 pages. Of these 42 pages, only 4 pages concerned the conflict of interest situation. Of these 4 pages, a mere 8 lines contained the exchange between the Court and Defendant Lawriw. This brief exchange, quoted in full in the statement of the case section of this petition, concerned in very summary fashion, the existence of a separate defense for Defendant Lawriw, the existence of a conflict, and the possibility that another lawyer could do something with the evidence available. It is certain that by this brief exchange, less than all the Supreme Court's procedural requirements for waiver of conflict of interest were met. Even if the requirements were formally met by this brief encounter, no judge could find that Defendant Lawriw understood the ramifications of a conflict of interest, her right to independent counsel—retained or appointed—and, therefore, that she intelligently waived these rights. Instead, the Court relied on the defense attorney's representations that he discussed the possibility of a conflict with the defendants and that there was no real conflict. (Tr. 22-23) When the Court itself is required to inquire into these facts it cannot be sufficient to rely on a defense attorney's representations. Indeed, if counsel renders ineffective assistance to his clients, how can he render effective assistance to the Court with respect to that client? Clearly, the Court must make the inquiry, not defense counsel. Since the Court did not make an inquiry sufficient

under decisions of the Supreme Court, the Eighth Circuit sanctioned a departure from the usual and accepted course of judicial proceedings. The Supreme Court should, therefore, exercise its supervisory powers and grant certiorari to correct this departure.

Assuming, alternatively, that the law as declared by the Eighth Circuit is correct, the Court of Appeals still sanctioned a departure from accepted judicial proceedings. By its decision, the Eighth Circuit requires a district court to "address each defendant personally and advise him of the potential danger of dual representation." *U.S. v. Lawriw*, slip op. at 15. These dangers were pointed out by the Eighth Circuit:

> The possibility of inconsistent pleas, factually inconsistent alibis, conflicts in testimony, differences in degree of involvement in the crime, tactical admission of evidence, the calling and cross-examination and impeachment of witnesses, (and) strategy in final summation.

U.S. v. Lawriw, slip op. at 8. It is possible to argue, though it is not conceded, that the District Court pointed out the danger regarding differences in degree of involvement in the crime. (Tr. 22) None of the other dangers, however, were explained to the Defendant. Nor was there any explanation about how the testimony developed at trial could bear on the ultimate sentence defendant receives, even if found guilty. It is, therefore, impossible to believe that the District Court followed the rules laid down by the Eighth Circuit in the instant case. The Supreme Court should exercise its supervisory powers and correct this departure from the usual and accepted course of judicial proceedings.

3. The conflict among Circuits on the issue in this case is manifest from the opinion of the Eighth Circuit and the Supreme Court should grant certiorari to resolve this conflict.

It has already been noted in argument 1 above that the Fifth Circuit requires the district court to elicit a narrative from the defendant regarding a waiver of conflict of interest before accepting that conflict of interest. *U.S. v. Garcia,* 517 F. 2d 272 (1975). The Eighth Circuit, by adopting the standards of *State v. Olsen,* — Minn. —, 258 NW2d 898 (1977), expressly rejects this Fifth Circuit requirement. This conflict alone should be sufficient to call for the grant of certiorari; however, the conflict among circuits goes much deeper, as the Eighth Circuit points out. *U.S. v. Lawriw,* slip op. at 8-12.

When considering a conflict of interest and its waiver, all resulting from dual representation by one attorney, the various Circuit Courts of Appeals are at variance on three questions:

a. Does the district court have a duty to inquire into the existence and waiver of a conflict of interest; and if so, what triggers this inquiry?

b. What is the scope of the district court's inquiry?

c. If the inquiry is not sufficient, does the burden of proof shift to the government to show harmless error?

a. Of the eleven Circuit Courts of Appeals, ten require some sort of inquiry by the district court into the existence and waiver of conflict of interest. *Campbell v. U.S.,* 352

F. 2d 359 (D.C. Cir. 1965); *U.S. v. Donahue,* 560 F. 2d 1039 (1st Cir. 1977); *U.S. v. Carrigan,* 543 F. 2d 1053 (2d Cir. 1976); *U.S. ex rel. Hart v. Davenport,* 478 F. 2d 203 (3d Cir. 1973); *U.S. v. Truglio,* 493 F. 2d 574 (4th Cir. 1974); *U.S. v. Smith,* 550 F. 2d 277 (5th Cir. 1977); *U.S. v. Lariche,* 549 F. 2d 1088 (6th Cir. 1977); *US. v. Lawriw,* — F. 2d — (8th Cir. 1977); *U.S. v. Kutas,* 542 F. 2d 527 (9th Cir. 1976); *U.S. v. Warledo,* 557 F. 2d 721 (10th Cir. 1977). Only the Seventh Circuit requires no inquiry at all, preferring to place "the primary responsibility for the ascertainment and avoidance of conflict situations . . . with the members of the bar." *U.S. v. Mandell,* 525 F. 2d 671, 677 (7th Cir. 1975). When an inquiry is required by the district court, the required timing of that inquiry varies radically from Circuit to Circuit. In some Circuits, an inquiry is required when two co-defendants appear with one attorney. *Campbell v. U.S., supra,* (D.C. Cir.); *U.S. v. Donahue, supra,* (1st Cir.); *U.S. v. Truglio, supra,* (4th Cir.). Some Circuits require an inquiry when the possibility of conflict is alleged. *U.S. v. Carrigan, supra,* (2d Cir.); *U.S. ex rel. Hart v. Davenport, supra,* (3d Cir.); *U.S. v. Smith, supra,* (5th Cir.); *U.S. v. Larich, supra,* (6th Cir.); *U.S. v. Lawriw, supra,* (8th Cir.). The Ninth Circuit requires a showing of actual conflict. *U.S v. Kutas, supra.* The Tenth Circuit has not addressed the question. The Third and Eighth Circuits specifically require the inquiry to be held as early in the proceedings as possible.

It is Petitioner's contention that an automatic hearing, as provided by the First, Fourth, and D.C. Circuits, is required. As such, the District Court in the instant case erred in not holding such an inquiry at arraignment, or

certainly at the suppression hearing. Expansion of this contention is reserved for Petitioner's brief on the merits.

b. At whatever stage an inquiry is required, the various Circuit Courts have established guidelines for the hearing; these guidelines cover a broad spectrum of investigation. The deepest inquiry is required by the Fourth and Fifth Circuits, *U.S. v. Truglio, supra;* and *U.S. v. Garcia,* 517 F. 2d 272 (5th Cir. 1975). Under these decisions, an examination similar to Rule 11, Federal Rules of Criminal Procedure, is required. Both Circuits note, however, that mere assent in response to a series of questions may not be adequate in some cases to assure a knowing and intelligent waiver. It is for this crucial reason that the court should seek to elicit a narrative from the defendant of his or her understanding of the right to effective assistance of counsel. *See* also *U.S. Carrigan, supra,* 543 F. 2d at 1055.

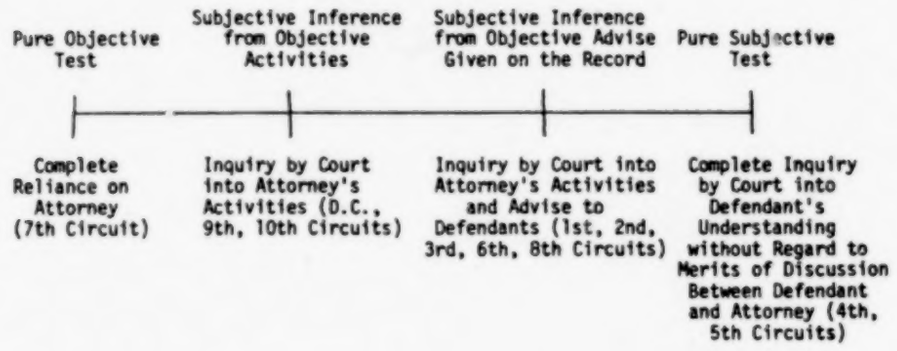
The Eighth Circuit explicitly declines to include this requirement in the procedure that Court established in *U.S. v. Lawriw*. In his opinion, Circuit Judge Webster quotes at length from the procedural requirements in *U.S. v. Garcia, supra*. The Court then adopts the procedure of the Minnesota Supreme Court in *State v. Olsen, supra*. By so doing, the Eighth Circuit, like the Minnesota Supreme Court, excludes mention of the requirement that the District Court elicit a narrative from the defendant regarding her understanding of the waiver. *U.S. v. Lawriw,* slip op. at 15; *State v. Olsen,* — Minn., at —, 258 NW2d at 907.

The other circuits require varying scopes of inquiry. The First, Second, Third, Sixth and Eighth Circuits require the District Court affirmatively to advise each defendant personally as to the dangers of conflict of interest. In the First Circuit, this means the District Court must comment on the risk of foregoing an attorney whose loyalty is undivided, as well as on the attorney's strategic problems with calling witnesses, including the defendant and his co-defendant(s), and with cross-examination of the government's witnesses. *U.S. v. Donahue, supra,* 560 F. 2d at 1043-1044. The Second Circuit requires merely that "the defendant should be fully advised by the trial court of the facts underlying the potential conflict." *U.S. v. Carrigan, supra,* 543 F. 2d at 1055. The Third Circuit declares that it is "highly desirable that (defendants) be appraised of (the dangers inherent in joint representation)" so that "difficult questions of whether a conflict of interest arose because of joint representation can be avoided." *U.S. ex rel. Hart v. Davenport, supra,* 478 F. 2d at 211. The standard in the Sixth Circuit requires the district court merely to warn the defendant of the possibility of conflict. *U.S. v. Lariche, supra,* 549 F. 2d at 1094. The Eighth Circuit requires that "the court should . . . advise (each defendant) of the potential danger of dual representation." *U.S. v. Lawriw,* slip op. at 15.

Another group of Circuits requires no affirmative comment by the district court on the dangers of dual representation. The D.C. Circuit mandates that the record show inquiry by the trial court into the job performance of the attorney as to explanation to the defendants of the potential conflict. *Campbell v. U.S., supra.* The Ninth Circuit requires that each defendant know of possible conflicts and his right to a separate attorney, that the record shows each defendant discussed these matters with his attorney, and his right to a separate attorney, that the record show

ing rise to conflict. *U.S. v. Kutas, supra,* 542 F. 2d at 529. Finally, the Tenth Circuit asks that defendants understand the possible conflicts and the meaningfulness of their waiver. *U.S. v. Warledo, supra,* 557 F. 2d at 727.

The significant characteristic about this group of decisions is their reliance on members of the bar to inform co-defendants about their rights in conflict of interest situations. This group of decisions completes the continuum from complete reliance on counsel, without any required inquiry by the court (*U.S. v. Mandell, supra,* (7th Cir.)) to complete reliance on the trial court, without any inquiry into the attorney's activities (*U.S. v. Garcia, supra,* (5th Cir.)). In its entirety that continuum appears as:


Pure Objective Test
Subjective Inference from Objective Activities
Subjective Inference from Objective Advise Given on the Record
Pure Subjective Test
Complete Reliance on Attorney (7th Circuit)
Inquiry by Court into Attorney's Activities (D.C., 9th, 10th Circuits)
Inquiry by Court into Attorney's Activities and Advise to Defendants (1st, 2nd, 3rd, 6th, 8th Circuits)
Complete Inquiry by Court into Defendant's Understanding without Regard to Merits of Discussion Between Defendant and Attorney (4th, 5th Circuits)

Such a wide range of requirements can only result in a defendant's being adequately represented in a conflict situation by the fortuitous happenstance of the crime's location. This should not be the state of the law with regard to so fundamental a right as effective assistance of counsel.

c. If the previously described conflict among the Circuits is not enough to warrant the grant of certiorari, then it should suffice to describe yet another conflict among the Circuits on this issue. The First Circuit has held, "When

a satisfactory inquiry does not appear on the record, the burden of persuasion will shift to the government." *U.S. v. Foster,* 469 F. 2d 1, 5 (1972); *U.S. v. Donahue, supra,* 560 F. 2d at 1042. The Minnesota Supreme Court adopted this requirement almost verbatim. *State v. Olsen, supra,* 258 NW2d at 907. On the other hand, in announcing its own rules, the Eighth Circuit said, ". . . a presumption of prejudice does not arise if the inquiry is not made, nor can we at this time adopt a burden-shifting procedure such as that announced in *State v. Olsen.*" *U.S. v. Lawriw,* slip op. at 15. The D.C.,[2] Second, and perhaps Tenth Circuits agree with the First Circuit; the Third and Ninth Circuits expressly agree with the Eighth Circuit. The remaining Circuits have not addressed the issue.

The significance of this issue rests on the concept of harmless error. *Chapman v. California,* 386 U.S. 18; *Lollar v. U.S.,* 376 F. 2d 243, 246 (D.C. Cir. 1967). Cf. *U.S. v. Lawriw,* slip op. at 8 n. 5. The threshold issue is whether some sort of affirmative inquiry on the record is required in the District Court. If such an inquiry is required, and no sufficient inquiry appears, then the burden is on the government to show harmless error in the District Court's failure to make sufficient inquiry. By this reasoning, it is error to hold that the burden of proof does not shift to the government upon an insufficient record of inquiry. See *U.S. ex rel. Hart v. Davenport, supra,* 478 F. 2d at 211; *U.S. v. Kutas, supra,* 542 F.2d at 529; *U.S. v. Lawriw,* slip op. at 15. Because harmless error must be shown beyond a reasonable doubt, *Chapman v. California, supra,* it is crucial to know by what standards to

[2] *Lollar v. U.S.,* 376 F. 2d 243 (D.C. Cir. 1967).

measure the district court's inquiry. With well defined standards applied consistently, it becomes possible to know with immensely greater precision at what point this burden shifts. With well-defined standards applied consistently, the ever-increasing and troublesome claims of ineffective assistance of counsel will be far less often brought before the courts. It is time to grant certiorari and resolve this pressing Constitutional problem. *See* S. Hyman, "Joint Representation of Multiple Defendants in a Criminal Trial," 5 *Hofstra Law Review*, 315 (1977).

4. The United States Supreme Court should grant certiorari to decide an important federal question that has not been but should be decided.

Petitioner contended in argument 1 above that *Von Moltke v. Gillies*, 332 U.S. 708 (1948), alone, by analogy, or in combination with other cases on waiver, controls the instant case. If this is not true, then no Supreme Court cases have decided the issues presented by the case at bar. If there are no controlling Supreme Court cases, then the Court should grant certiorari in this case in order to fill a void so obviously felt by the Circuit Courts of Appeals in their struggles to cope with these issues.

In its starkest terms, the importance of this question appears in light of consideration by the Supreme Court Advisory Committee on Criminal Rules of an amendment to the criminal rules dealing with conflict of interest. See *U.S. v. Garafola*, 428 F. Supp. 620, 626, n. 11 (1977). By the time this case is argued and decided the Committee's Rule will be published in draft, if not final, form. This case, therefore, presents an opportunity for the Court

to examine the proposed rule in light of the hard realities of a pending decision.

There is another important reason for the Court to consider at this time the issues presented by this case: a small, but growing number of judges have found that knowing and intelligent waiver of counsel is all but impossible. These judges would automatically require that two jointly charged co-defendants be separately represented. The principle was first discussed by Circuit Judge Oakes, concurring, in *U.S. v. Mari*, 526 F. 2d 117, 119, 121 (2d Cir. 1975):

> The time is rapidly approaching, however, when, in the light of more exacting standards of the Bar and the decisions of other leading courts, we may have to re-examine our rule.
>
> * * *
>
> Trial court insistence that, except in extraordinary circumstances, co-defendants retain separate counsel will in the long run in my opinion prove salutary not only to the administration of justice and the appearance of justice but the cost of justice; habeas corpus petitions, petitions for new trials, appeals and occasionally retrials can be avoided. (citation omitted) Issues as to whether there is an actual conflict of interest, whether the conflict has resulted in prejudice, whether there has been a waiver, whether the waiver is intelligent and knowledgeable, for example, can all be avoided. Where a conflict that first did not appear subsequently arises in or before trial (citations omitted), continuances or mistrials can be saved. Essentially by the time a case such as the present one gets to the appellate level the harm to the appearance of justice has already been done, whether or not reversal occurs; at the trial level it is a matter which is so easy to avoid. . . ."

The next year, a majority of the Second Circuit seemed to agree with Judge Oakes. In *U.S. v. Bernstein,* 533 F. 2d 775 (2d Cir. 1976), the defendant's attorney was being paid by the defendant's employer. The employer's interests in freedom from corporate and individual liability conflicted with the defendant's interests. The District Court closely questioned defendant's waiver of the conflict; defendant's attorney ultimately withdrew. In commenting on these occurrences, the Court said, "The District Court handled the matter, we think, quite correctly, and Mr. Boitel (defendant's attorney) withdrew quite correctly." *U.S. v. Bernstein,* supra, 533 F. 2d at 778.

Later that same year, Circuit Judge Lumbard, of the Second Circuit, concurred specially by opinion in *U.S. v. Carrigan,* 543 F. 2d 1053, 1057 (1976). He said:

> It has become increasingly clear that the only way to ensure adequate representation for each defendant in a multi-defendant case is the initiative of the court to require separate counsel as soon as the court is aware of such a situation. The adoption of a rule by each district court, or by action of the court of appeals for the circuit, would solve the problem. However, until such a solution is agreed upon, we must examine the circumstances of each situation, with the result that additional judicial resources may be expended on a retrial of the defendants affected. (Citation omitted)
>
> * * *
>
> It would be a rare defendant who could intelligently decide whether his interests will be properly served by counsel who also represents another defendant. However parallel his interests may seem to be with those of a co-defendant the course of events in the

> prosecution of the case, the taking of a guilty plea, or the conduct of the trial may radically change the situation so as to impair the ability of counsel to represent the defendant most effectively. Even defense counsel, who all too frequently are not adequately informed regarding the evidence available against their clients, may not be in a position to judge whether a conflict of interest between their clients may develop.
>
> It is a rare defendant in a criminal case who fully advises his own counsel of all he knows about the charges against him. Accordingly, most counsel must operate somewhat in the dark and feel their way uncertainly to an understanding of what their clients may be called upon to meet upon a trial. Consequently, counsel are frequently unable to foresee developments which may require changes in strategy.
>
> It follows that there will be cases where the court should require separate counsel to represent certain defendants despite the expressed wishes of such defendants.

U.S. v. Carrigan, supra, 543 F. 2d at 1058.

Most recently, the United States District Court for the District of New Jersey, Lacey, J ., felt compelled to comment on the issue in a similar manner. Recall that in the Third Circuit, affirmative inquiry is required of the District Court under *U.S. ex rel. Hart v. Davenport,* 478 F. 2d 203 (1973). Judge Lacey said:

> The *Davenport* inquiry, by and large, is an ineffective charade. The judge and counsel know the purpose of the inquiry; to forestall a convicted defendant from later successfully urging on appeal that he did not at trial have effective assistance of counsel. Put

in other words, it is done to construct a predicate for claiming later that there has been a waiver of a constitutional right. For reasons I shall explicate, it fails utterly as a means of assuring an informed consent from jointly represented—and unsophisticated—defendants.

In the recently decided *Matter of Grand Jury Empaneled January 21, 1975*, 536 F. 2d 1009 (3d Cir. 1976), the court of appeals stated that, as is the case with other constitutional rights, "the *Davenport* right may be waived." *Id.* at 1012. The court went on to find that "a waiver is exactly what the district court elicited from each of the appellants at the hearings conducted in this case." (footnote omitted) With all deference, I question whether there can be a waiver in the *Johnson v. Zerbst* sense. (footnote omitted)

Many trial judges are concerned about the ability and capacity of any defendant knowingly and intelligently to waive his sixth amendment right to the effective assistance of counsel within the context of a *Davenport* inquiry into joint representation. The average defendant cannot possibly understand fully and completely the extent to which his counsel's trial strategy may be affected by his representation of other defendants. Moreover, what of the situation, not uncommon where a "strong defendant" thrusts his own attorney upon a "weak" co-defendant? The latter does not dare indicate his displeasure with the joint representation. In simple terms, the *Davenport* inquiry, to the extent it is directed at the defendants, is a futile exercise. There can be no real waiver.[7]

[7]In a paper adapted from a speech given at the National College of Criminal Defense Lawyers and Public Defenders in Houston, Texas, on June 24, 1976, Alan Y. Cole, Esq., Chairman of the Section of Criminal Justice, American Bar Association, has stated, after discussing the Third Circuit (536 F. 2d 1009 (1976)) and District of Columbia Circuit (531 F. 2d 660 (1976)) cases,

> This is a dismal scene. The attorney conduct involved in these cases is hardly of a nature that enchances the image of the profession. It does not reflect respect for the principles underlying the canon of ethics. It suggests that self-regulation by the profession is essentially non-existent. The judicial response is likewise unsatisfactory to a society which is already disenchanted with its lawyers and its courts.
>
> Cole, Time for a Change: Multiple Representation Should be Stopped 9-10 (unpublished) (footnote omitted).
>
> I do not join in Mr. Cole's pungent criticism of the bar and bench; however, it is deserving of reflection that a leading member of the bar, active in the defense of criminal cases, finds the situation warrants such candid comments.

Respectfully it is submitted that the trial judge cannot conduct a meaningful inquiry. He does not know the case. He cannot know the facts or the inferences which may be fairly drawn from them. He is unaware of the quality of the witnesses and the trial strategy the government and the defendants will pursue. Nor can he inquire into the defense without violating defendant's fifth and sixth amendments rights; and this is so whether the interrogation is held in open court or *in camera*. He is restricted to imparting vaguely contoured, abstract advice on a doctrine as to which the lawyer then and there present has undoubtedly already advised his clients. Indeed, the attorney's words will have more meaning to the defendants because they are not empty abstractions but related to the facts of the case. He has already told his clients that there is no conflict in their interests. Thus, when the defendants answer the court's inquiry, they actually are relying upon the advice received from their lawyer. If he tells them there is no conflict and that he can effectively represent them, how can their responses to the court be deemed to amount to a *Johnson v. Zerbst* waiver of their sixth amendment right to effective aid of counsel?

* * * * * *

The next question to be put is whether joint representation should be allowed, no matter how remote the possibility of a potential conflict of interest. Unfortunately, no matter how thorough an attorney's investigation, he may not be aware of those facts which suggest the possibility of a conflict.

* * * * * *

That there is much wisdom in the suggestion made by Judge Lumbard that there be "separate counsel for each defendant in a multi-defendant case" (543 F. 2d at 1058) is further underscored by the fact that it is not possible to "anticipate with complete accuracy the course that a criminal trial may take." *Fryar v. United States,* 404 F. 2d 1071, 1073 (10th Cir. 1968), *cert. denied,* 395 U.S. 964 (1959).

* * * * * *

The trial judges are in need of guidance in this delicate and sensitive area. (footnote omitted)

U.S. v. Garafola, supra, 428 F. Supp. at 623-626.

The only concern remaining with adopting the position of Judge Lacy is the collection of statements that:

> If defendants may dispense with the right to be represented by counsel altogether, *Faretta v. California,* 422 U.S. 806 (1975),[4] it would seem that they may waive the right to have their retained counsel free from conflicts of interests.

[4]In reaching this conclusion, we are cognizant of a line of cases indicating that the right to dispense with counsel at trial is not absolute but may be denied in appropriate circumstances. E.g., *Manson v. Pitchess,* 317 F. Supp. 816 (C.D. Calif., 1970); *Seale v. Hoffman,* 306 F. Supp. 330 (N.D. Ill., 1969); *U.S. v. Davis,* 260 F. Supp. 1009 (E.D. Tenn., 1966).

U.S. v. Garcia, 517 F. 2d 272, 277 (5th Cir. 1975). Judge Lacey dealt with this problem in *Garafola:*

The reasoning supporting the "waiver" doctrine in this context of joint representation seemingly is founded upon an analysis of the sixth amendment from which there emerges the concept that, because there is a right to waive counsel altogether, *Faretta v. California,* 422 U.S. 806 (1975), there is also a right to waive effective assistance of counsel. Like so many seemingly simple truths, this one has its frailties. The absolute, that is, counsel or none, as is so often the case, is easier to define and deal with than the relative, that is, is one counsel or another better able to represent the defendant. A trial judge can quite readily advise a defendant on the wisdom of proceeding with counsel, the bases for his advice and the pitfalls which a defendant will encounter absent counsel. On the other hand, in view of the limitations already alluded to in this opinion, the joint representation inquiry falls far short of assuring a knowing and intelligent waiver.

U.S. v. Garafola, supra, 428 F. Supp. at 624-625. *Faretta,* therefore, does not stand in the way of an automatic requirement of separate counsel in a conflict of interest situation. Once separate counsel is retained or appointed, the right to counsel may then be waived under *Faretta.*

CONCLUSION

For the many, varied and critical reasons discussed above, Petitioner respectfully requests the United States Supreme Court grant a writ of certiorari in this case to review the decision of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

MARC G. KURZMAN
MARC G. KURZMAN LAW OFFICE CHARTERED
601 West Butler Square
Minneapolis, Minnesota 55403
Telephone: 612-333-4403
Counsel for Petitioner

Assisted By:
RONALD S. GOLDSER, Law Clerk
MARC G. KURZMAN LAW OFFICE, CHARTERED
601 West Butler Square
Minneapolis, Minnesota 55403

APPENDIX A

United States Court of Appeals
For The Eighth Circuit

No. 77-1409

United States of America,

Appellee,

vs.

Anna Erna Lawriw,

Appellant.

Appeal from the United States District Court for the District of Minnesota.

Submitted: August 31, 1977

Filed: December 30, 1977

Before GIBSON, Chief Judge, HEANEY and WEBSTER, Circuit Judges.

WEBSTER, Circuit Judge.

Once again we are called upon to review a post-conviction claim that a defendant in a criminal trial, jointly represented with a codefendant by a single attorney, was denied effective assistance of counsel. Consistent with our earlier decisions in which we have identified the pitfalls

of this practice, we announce today an affirmative duty of inquiry by the district court. Such an inquiry was conducted by the District Court[1] in the case now before us on appeal, and we are satisfied that it accomplished the purposes to be served by such inquiry and that appellant did, as the District Court found, knowingly and intelligently waive her right to separate counsel. Since this is the only issue before us, we affirm the District Court's denial of post-conviction relief.

I.

Appellant Anna Lawriw was convicted in a joint trial with Terrance Richard Noto of unlawful possession of cocaine with intent to distribute in violation of 21 U.S.C. §841(a)(1).[2] The case was tried to the District Court without a jury on stipulated facts. The purpose of this procedure was to preserve for appellate review the denial of a pretrial motion to suppress evidence seized following a warrantless search of the motel where Lawriw and Noto were staying at the time of their arrest. On appeal we rejected the search and seizure contention and affirmed the conviction in an unreported opinion. *United States v. Noto*, Nos. 76-2076, 76-2077 (8th Cir. April 1, 1977). Thereafter, Lawriw filed a motion for a new trial on the ground of newly discovered evidence, *see* Fed. R. Crim. P. 33, contending that she had an independent defense that she was precluded from raising by reason of the dual

[1]The Honorable Miles W. Lord, United States District Court for the District of Minnesota.

[2]Appellant was sentenced to five years imprisonment and an additional three years of special parole.

representation, and hence was denied her Sixth Amendment right to effective assistance of counsel. Following a hearing, the District Court held that there was no conflict of interest making the assistance of counsel ineffective, and if there was, that Lawriw had waived this right. Her motion was denied, and this appeal followed.

Appellant's arrest occurred on April 8, 1976, when federal drug agents entered the motel room occupied by Lawriw and Noto in Hennepin County, Minnesota, and seized approximately one pound of cocaine in a flight bag also containing both male and female toiletries and a prescription vial in the name of Lawriw. As revealed by the stipulation of facts, Lawriw was seated on a bed, adjacent to which was a suitcase containing $5,700 in cash. $3100 of that amount was money paid the previous evening by federal agents to obtain two ounces of cocaine from associates of Lawriw. Documentation and correspondence, all addressed to Lawriw, were also found in the suitcase.

In this appeal appellant contends that dual representation at her joint trial deprived her of the opportunity to assert that she lacked knowledge of the presence of the cocaine in the room, and hence she could not have been guilty of possession with intent to distribute.

At the commencement of the trial the District Court and defense counsel questioned both defendants regarding their awareness of the possibility of conflict, and the record reveals that both defendants had discussed this possibility with their retained counsel and still desired him to represent them jointly. In their presence, and without challenge, their attorney, Joseph S. Friedberg, represented to the

Court that he had discussed the possibility that one defendant might seek to place the blame on the other and that neither party wanted to do this.

The point presented on this appeal first surfaced when the District Court asked appellant to read the stipulation of facts into the record. When appellant appeared to be taking issue with some of the stipulated facts during the reading, the District Court ordered her placed under oath and examined her as to the facts stipulated.

The following colloquy is illustrative. Appellant had questioned the stipulation that there was a pound of cocaine in the room. The court examined her on this point.

> [COURT:] Was there a pound of cocaine in that room before the agents came in there?
>
> A. I didn't know that there was a pound of cocaine in the room before the agents came in.
>
> THE COURT: All right. Then that ends this. We will now get ready for the trial of the case.
>
> MR. FRIEDBERG: Your Honor, may I ask one more question?
>
> THE COURT: Well go ahead.
>
> BY MR. FRIEDBERG:
>
> Q. Did you know there was cocaine in that room?
>
> A. I knew there was cocaine in the room.
>
> Q. You didn't know exactly—
>
> A. I didn't know how much cocaine was in the room.
>
> MR. FRIEDBERG: I think what she is saying, she didn't know that it was exactly a pound, Your Honor.

The District Court properly concluded from this and other testimony that appellant did in fact know that there was cocaine in the room but was unsure of the exact amount. At the post-conviction hearing on her motion for a new trial appellant testified that she only had knowledge of a small amount of cocaine, less than one gram, which she alleged was on a table in the room when the police entered. Read in the light of the whole record we find this after-the-fact assertion to be peculiarly unconvincing, and the District Court did not err in rejecting it.[3] We likewise hold on the whole record that the District Court correctly held that appellant made a knowing and intelligent waiver of her right to be represented separately and to present her independent defense. We are able to reach this conclusion because the experienced trial judge conducted a sufficient inquiry in advance of trial to assure that there was no possibility of conflict in the dual representation which appellant did not choose knowingly and intelligently to waive.

II.

It has become increasingly apparent that dual representation is fraught with risk of conflict and should be approached with caution by the parties and by counsel. Recognizing this, we have said in this Circuit that responsibil-

---

[3]As was fully developed at the hearing on the post-conviction motions the stipulation referred to cocaine located in a flight bag. When examined by the District Court about the stipulation during the trial appellant had simply contended that she did not know how much cocaine was in the room. She did not at that time contend that she had no knowledge of the cocaine in the flight bag. The post-trial explanation of appellant is entitled to little weight, and the District Court properly rejected it.

ity for avoiding such risks lies heavily both with the trial court, *see United States v. Williams*, 429 F. 2d 158, 161 (8th Cir.), *cert. denied*, 400 U.S. 947 (1970), and with counsel, *United States v. Valenzuela*, 521 F. 2d 414, 416 n. 1 (8th Cir. 1975), *cert. denied*, 424 U.S. 916 (1976).[4] In *Williams* we held that such an inquiry was required of the trial court in cases involving appointed counsel. For reasons that will appear below we think this rule applies equally to retained counsel. *Cf. United States v. Valenzuela, supra*, 521 F. 2d at 416 (applying same standard of prejudice to retained counsel).

In *Glasser v. United States*, 315 U.S. 60, 70 (1942), a case in which the trial court had appointed the associate counsel of one defendant to be counsel for another, the Supreme Court stated:

> [T]he "assistance of counsel" guaranteed by the Sixth Amendment contemplates that such assistance be untrameled and unimparied by a court order requiring that one lawyer simultaneously represent conflicting interests.

The Sixth Amendment right to effective assistance of counsel contemplates the assistance of a counsel free from conflicts of interest, and able to render independent judgment on behalf of his client. *See, e.g., United States, ex rel. Hart v. Davenport*, 478 F. 2d 203 (3d Cir. 1973).

We have recognized in earlier decisions that dual representation of codefendants is not *per se* violative of the

[4] *See also* ABA Standards Relating to the Defense Function §3.5 (Approved Draft 1970).

Sixth Amendment right. *See, e.g., United States v. Williams, supra*, 429 F. 2d at 160. We have required a showing of an actual conflict of interest or evidence pointing to a substantial possibility of a conflict of interest before reversal is commanded on this ground alone. *United States v. Valenzuela, supra*, 521 F. 2d at 416; *United States v. Irons*, 475 F. 2d 40, 43 (8th Cir.), *cert. denied*, 412 U.S. 951 (1973); *United States v. Williams, supra*, 429 F. 2d at 161.

On the other hand we have not hesitated to hold that a defendant was denied effective assistance of counsel when dual representation precluded him from asserting an independent defense. *See, e.g., Robinson v. Parratt*, 546 F. 2d 764 (8th Cir. 1976), *aff'g* 421 F. Supp. 664 (D. Neb. 1976). In that case the defenses of two jointly represented defendants had become antagonistic to each other because the alibi defense of one of them had fallen through and the dual representation precluded the other from asserting that the crime had been committed by his codefendant before he arrived on the scene. We rejected as inadequate the defense counsel's eleventh hour request for severance as a satisfactory alternative. In another case, we upheld a conviction on the basis that a waiver had occurred, but we criticized the joint representation of two accountants in an income tax case in which one defendant testified that the negligence of his codefendant was part of the reason he failed to file his return. *United States v. Swanson*, 509 F. 2d 1205, 1210 n. 7 (8th Cir. 1975).

Indeed, the Minnesota Supreme Court has recently identified a number of significant areas in which dual repre-

sentation has presented additional burdens to the defense: "the possibility of inconsistent pleas, factually inconsistent alibis, conflicts in testimony, differences in degree of involvement in the crime, tactical admission of evidence, the calling and cross-examination and impeachment of witnesses, [and] strategy in final summation." *State v. Olsen*, No. 229, slip op. at 10-11 (Minn. Sup. Ct. Oct. 7, 1977) (footnotes omitted). While the potential for prejudice is not so inherent as to require a *per se* rule of conflict, it is nonetheless sufficiently pervasive that only a minimal showing of conflict should be required to invoke constitutional protection.[5] Thus, in most cases the question will not be so much whether a conflict existed, but whether the defendant effectively *waived* it.

The Circuits are divided on whether the trial judge has a duty to inquire into conflicts or whether that responsibility may properly be left with defense counsel. The Seventh Circuit has held that the trial judge need only "be watchful for indicia of conflict during trial," *United States v. Mandell*, 525 F. 2d 671, 677 (7th Cir. 1975), *cert. denied*, 423 U.S. 1049 (1976) (holding that primary responsibility rests with "members of the bar"). The Fifth Circuit has rejected a *per se* test and held that "a trial court does not need to advise a defendant of the right to separate counsel in the event of a conflict of interest between codefendants, where there was neither objection,

[5]Since what is at stake here is a constitutional right, it would seem that denial of such protections can be considered harmless error only if it can be said to be harmless beyond reasonable doubt. *See Chapman v. California*, 386 U.S. 18 (1967); *Lollar v. United States*, 376 F. 2d 243, 247 (D.C. Cir. 1967).

claim, nor notice to the court of any alleged conflict between the interests of the defendants." *United States v. Boudreaux*, 502 F. 2d 557, 558 (5th Cir. 1974). *See also United States v. Smith*, 550 F. 2d 277, 286 (5th Cir. 1977).

In *United States v. Lariche*, 549 F. 2d 1088 (6th Cir.), *cert. denied*, 430 U.S. 987 (1977), the Court held that a defendant must show an actual conflict of interest in order to prevail on a claim of ineffective assistance of counsel, but the facts of the case involved a hearing held by the trial judge in which the possible conflict of interest was discussed with the jointly represented defendant. *See id.* at 1095. In addition, the Ninth Circuit has said in *United States v. Christopher*, 488 F. 2d 849, 851 (9th Cir. 1973), that the "failure of a trial court to advise co-defendants that they have the right to separate counsel, absent a showing in the record of conflicting interests, is not reversible error."[6]

The Second Circuit has held that a trial judge should make a careful inquiry before *appointing* one attorney to represent two or more defendants. *Morgan v. United States*, 396 F. 2d 110 (2d Cir. 1968). In *United States v. Alberti*, 470 F. 2d 878, 881-82 (2d Cir. 1972), *cert. denied*, 411 U.S. 919 (1973) the Court stated that whenever a potential conflict becomes apparent regarding retained counsel the trial judge,

[6]Our research has not disclosed a case in which the Tenth Circuit has faced the issue of what inquiry must be made by the trial judge when confronted by codefendants represented by the same counsel. It has, however, held that it is not inherent error to *appoint* the same counsel to represent codefendants in the absence of actual prejudice. *See United States v. Smith*, 464 F.2d 194 (10th Cir.), *cert. denied*, 409 U.S. 1066 (1972); *Fryar v. United States*, 404 F. 2d 1071 (10th Cir. 1968), *cert. denied*, 395 U.S. 964 (1969).

> should conduct a hearing to determine whether there exists a conflict of interest with regard to defendant's counsel such that the defendant will be prevented from receiving advice and assistance sufficient to afford him the quality of representation guaranteed by the sixth amendment. In addition, the trial judge should see that the defendant is fully advised of the facts underlying the potential conflict and is given a chance to express his or her views.

This rule has been upheld in later decisions although in none of them has the Court been willing to hold that this duty is automatic; rather it is triggered "when a potential conflict of interest arises." *See Abraham v. United States,* 549 F. 2d 236, 239 (2d Cir. 1977); *United States v. Carrigan,* 543 F. 2d 1053, 1055 (2d Cir. 1976).

The Third Circuit appears to have established an even more expansive role for trial court judges. The Court has held that "upon a showing of a possible conflict of interest or prejudice, however remote, we will regard joint representation as constitutionally defective." *United States ex rel. Hart v. Davenport, supra,* 478 F. 2d at 210. Although unwilling to adopt a *per se* reversal rule, the Court stated that the trial judge should warn defendants of the dangers inherent in joint representation "at the earliest stage of the criminal justice process." *Id.* at 211.

Two circuits have announced an affirmative duty of inquiry by trial judges. The District of Columbia has held that "[w]hen two or more defendants are represented by a single counsel, the District Court has a duty to ascertain

whether each defendant has an awareness of the potential risks of that course and nevertheless has knowingly chosen it." *Campbell v. United States,* 352 F. 2d 359, 360 (D.C. Cir. 1965). The Court said this is not a rule requiring separate representation in all cases, but rather one which requires the trial judge to insure that the decision to proceed with one attorney is an "informed decision." If the trial judge does not do this, reversal is required.

A rule somewhat less inflexible but more definitive in its scope has been announced in the First Circuit, where trial judges are required to comment to defendants on the risks of joint representation and to inquire whether they have discussed these risks with their attorney and whether or not they understand their right to a separate attorney. *United States v. Foster,* 469 F. 2d 1, 5 (1st Cir. 1972). The exact timing of the inquiry, however, is left to the trial judge's discretion. Once this is done, and if the inquiry appears on the record, the defendant bears a heavy burden to show that his trial was unfair. If inquiry is not made, or if it does not appear on the record, the government bears the burden to show that the existence of prejudice was improbable, if the matter is on direct appeal, or was unlikely by a preponderance of the evidence, if the conviction is under collateral attack.

The Fourth Circuit also appears to require an inquiry by the trial judge whenever two defendants are represented by the same attorney.

> [W]hile representation of codefendants by the same attorney is not in itself tantamount to the denial of effective assistance of counsel, "[t]he very fact that two or more co-defendants are represented by the

> same counsel should alert a trial judge and cause him to inquire whether the defenses to be presented in any way conflict."

United States v. Truglio, 493 F. 2d 574, 579 (4th Cir. 1974) (finding that conflict of interest denied effective assistance of counsel), *citing United States v. Lovano*, 420 F. 2d 769, 772 (2d Cir. 1970).[7]

The decisions of the Eighth Circuit to date (1) do not impose an automatic duty of inquiry upon the district court,[8] (2) reject a *per se* rule of conflict, requiring that at least the substantial likelihood of prejudice be shown[9] but (3) express concern that defendants may be placed in such a conflict at some time during trial, thereby placing in jeopardy the fairness of the trial.[10] Courts that do not apply a *per se* rule of conflict (and we do not) nonetheless have urged trial judges to be alert and sensitive to the likelihood of conflict that dual representation presents. If the court has not conducted a meaningful inquiry at an early stage, it is doubtful that the prejudicial effects of a conflict can be avoided.[11]

---

[7]*See also* ABA Standards Relating to the Function of the Trial Judge §3.4(b) (Approved Draft 1972) (requiring automatic inquiry by the trial judge).

[8]*See, e.g., United States v. Valenzuela*, 521 F. 2d 414 (8th Cir. 1975), *cert. denied*, 424 U.S. 916 (1976).

[9]*See, e.g., United States v. Valenzuela, supra; United States v. Williams*, 429 F. 2d 158 (8th Cir.), *cert. denied*, 400 U.S. 947 (1970).

[10]*See, e.g., United States v. Swanson*, 509 F. 2d 1205, 1210 n.7 (8th Cir. 1975).

[11]Such an inquiry should come as early in the criminal process as possible. *See United States ex rel. Hart v. Davenport*, 478 F. 2d 203, 211 (3d Cir. 1973). If the proceedings are allowed to go forward before it is determined that counsel has a conflict of interest, it may be necessary to disqualify counsel from representing either defendant, as was done by Judge Lacey in *United States v. Garafola*, 428 F. Supp. 620, 623 (D.N.J. 1977).

III.

Requiring a meaningful inquiry by the trial court serves both the defendant and the prosecution because it offers a greater likelihood that possible conflicts of interest can be identified and explored with the defendant so that other legal representation can be provided before prejudicial error has occurred, or, in the alternative, the record of such inquiry will show that, notwithstanding such potential conflict of interest, the defendant made a knowing and intelligent waiver of his right to separate counsel and, for reasons sufficient to the defendant, elected to go to trial with dual representation.

In this Circuit we recognize that the Sixth Amendment right to effective assistance of counsel may be waived if such a waiver is knowing and intelligent. *See United States v. Swanson, supra*, 509 F. 2d at 1210 n. 7; *Larry Buffalo Chief v. South Dakota*, 425 F. 2d 271, 280 (8th Cir. 1970). *See also United States v. Gaines*, 529 F. 2d 1038, 1044 (7th Cir. 1976); *United States ex rel. Hart v. Davenport, supra*, 478 F. 2d at 210. *Cf. Faretta v. California*, 422 U.S. 806 (1975) (accused has right to waive the assistance of counsel and to appear *pro se*). In *Larry Buffalo Chief* we said, "[W]here a possible conflict of interest is pointed out to an accused and the accused then makes an intelligent and intentional waiver, he cannot later complain." 425 F. 2d at 280. Because the conflicts are often subtle it is not enough to rely upon counsel, who may not be totally disinterested, to make sure that each of his joint clients has made an effective waiver. The Fifth Circuit,

which also does not have a *per se* rule, *see United States v. Smith, supra,* 550 F. 2d at 286, has nonetheless spelled out in significant detail what must be done to assure an adequate waiver.

> [The] district court should address each defendant personally and forthrightly advise him of the potential dangers of representation by counsel with a conflict of interest. The defendant must be at liberty to question the district court as to the nature and consequences of his legal representation. Most significantly, the court should seek to elicit a narrative response from each defendant that he has been advised of his right to effective representation, that he understands the details of his attorney's possible conflict of interest and the potential perils of such a conflict, that he has discussed the matter with his attorney or if he wishes with outside counsel, and that he voluntarily waives his Sixth Amendment protections. . . . It is, of course, vital that the waiver be established by "clear, unequivocal, and unambiguous language." . . . Mere assent in response to a series of questions from the bench may in some circumstances constitute an adequate waiver, but the court should nonetheless endeavor to have each defendant personally articulate in detail his intent to forego this significant constitutional protection. Recordation of the waiver colloquy between defendant and judge will also serve the government's interest by assisting in shielding any potential conviction from collateral attack, either on Sixth Amendment grounds or on a

> Fifth or Fourteenth Amendment "fundamental fairness" basis.

United States v. Garcia, 517 F. 2d 272, 278 (5th Cir. 1975).

The Minnesota Supreme Court has recently adopted the following formulation:

> The defendant must voluntarily and with full knowledge of the consequences decide on dual representation. The court should address each defendant personally and advise him of the potential danger of dual representation. The defendant should have an opportunity and be at liberty to question the trial court on the nature and consequences of dual representation and the entire procedure should be placed on the record for review. When satisfactory inquiry does not appear on the record, the burden shifts to the state to demonstrate beyond a reasonable doubt that a prejudicial conflict of interests did not exist.

State v. Olsen, supra, slip op. at 14 (footnotes omitted).

In view of our holding in *United States v. Valenzuela, supra,* a presumption of prejudice does not arise if the inquiry is not made, nor can we at this time adopt a burden-shifting procedure such as that announced in *State v. Olsen, supra,* although there is much to commend it. We do, however, state that it is the duty of the trial court to make an inquiry similar to that required in *State v. Olsen, supra,* and we anticipate that without such an inquiry a finding of knowing and intelligent waiver will seldom, if

ever, be sustained by this Court. *Cf. Austin v. Erickson*, 477 F. 2d 620 (8th Cir. 1973) (the government did not meet its burden by showing waiver of right to appointed counsel free from conflict of interest).[12] Considering the minimal showing needed to establish the substantial possibility of a conflict of interest, the importance of an adequate record to underpin a finding of waiver cannot be overstated. The administration of justice is best served by such an inquiry and we now require it.

The record reveals that such an inquiry was made by the District Court in this case. Prior to accepting the stipulation of facts, an on-the-record inquiry took place regarding the conflict of interest problem in which Lawriw, Noto, Judge Lord, and appellant's trial counsel took part. Our review of that inquiry convinces us that appellant's

[12]The issue of whether there has been an effective waiver is one requiring much sensitivity on the part of the trial court. It has been noted that in the proper case the trial judge may refuse to give effect to a professed desire to go forward with joint representation and may order separate counsel for codefendants. *See, e.g., Abraham v. United States*, 549 F. 2d 236, 239 (2d Cir. 1977); *United States v. Garafola, supra.* One basis for this would be a finding that the attempted waiver was not knowing and intelligent. *See United States v. Garafola, supra.* In *United States v. Carrigan*, 543 F. 2d 1053, 1057-58 (2d Cir. 1976) (Lumbard, J., concurring), Judge Lumbard expressed the view that it is a rare defendant who can intelligently determine that his interests will be properly served by counsel who is also representing another defendant, and even defense counsel may not be fully informed by his clients of all the facts necessary to make a determination.

> It follows that there will be cases where the court should require separate counsel to represent certain defendants despite the expressed wishes of such defendants. . . . The right to effective representation by counsel whose loyalty is undivided is so paramount in the proper administration of criminal justice that it must in some cases take precedence over all other considerations, including the expressed preference of the defendants concerned and their attorney.

Id. at 1058. *See also United States v. Bernstein*, 533 F. 2d 775, 787-89 (2d Cir. 1976).

claim that her waiver was not given voluntarily or intelligently is without merit.

The inquiry covered both the appellant's right to separate, independent counsel and the particular way in which defense conduct might differ if there were separate attorneys. In addition, there is the statement of appellant's trial counsel to Judge Lord, which he repeated in his testimony at the hearing on the motion for a new trial, that he spoke with both Noto and Lawriw regarding the strength of their respective cases and defenses. There was substantial basis for the District Court to find the contention of appellant, that she did not understand the significance of her decision to proceed with one attorney, to be incredible. We agree with the District Court that she knowingly and intelligently waived her Sixth Amendment right to counsel unimpaired by conflict of interest, even if a conflict did in fact exist in this case.[13]

Affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

---

[13]Appellant's final contention is that the District Court erred in not treating the trial on stipulated facts as a guilty plea and complying with the requirements of Fed.R.Crim.P. 11. This contention, however, fails to note the difference between a stipulation of facts, even one tending to establish the stipulating party's guilt, and a plea of guilty or nolo contendere. *See United States v. Terrack*, 515 F. 2d 558, 560 (9th Cir. 1975); *United States v. Brown*, 138 U.S. App. D.C. 398, 428 F. 2d 1100, 1103 (1970).

> An inquiry as thorough as that prescribed by Fed.R.Crim.P. 11 is not required before the district court accepts a stipulation of facts establishing guilt from a criminal defendant. In this case, the government's attorney and the trial judge sufficiently addressed Lawriw, as well as codefendant Noto in the presence of Lawriw, as to the rights that she surrendered as a result of signing the stipulation.

APPENDIX B

The District Court's findings of fact, conclusions of law and order were made from the bench and are contained in the transcript of the hearing on Petitioner's motion for new trial, at pages 46-47:

> THE COURT: Miss Lawriw, by her own admissions, has time and again put herself in the position where she was jointly and severally in control of those drugs.
>
> First of all, I find no conflict of interest, even by her testimony today and her statements in response to the Court's questions. I find that if there was a conflict, which there was not, that they waived it. If there was an apparent conflict, they waived it.
>
> I find that she knew what she was doing at all times. She was in partnership with this gentleman and was guilty of the crime of which she was convicted.
>
> I find that she is overdue for prison, deny the motion and commend her immediately to the custody of the U.S. Marshal.